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Nos. 07-1428, 08-328

In The
Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO, AND CITY OF NEW HAVEN,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF BRIDGEPORT FIREFIGHTERS FOR MERIT EMPLOYMENT, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The *amicus curiae* is Bridgeport Firefighters for Merit Employment, Inc. ("BFME"). BFME is a non-profit organization of firefighters dedicated to the preservation of the merit system in municipal employment. BFME has 92 members, about one-third of Bridgeport, Connecticut's fire department. The District Court ruling and the Second Circuit affirmance in the present case already have had a direct, profound, and negative effect on the civil service merit system for promoting firefighters in Bridgeport, and have the potential to similarly affect municipalities across the state of Connecticut. Accordingly, BFME has a keen interest in the outcome of this case.[1]

SUMMARY OF ARGUMENT

As expressed by several decisions of the Connecticut Supreme Court during the last four decades,

[1] All parties have consented in writing to the filing of this brief. By letter dated January 28, 2009, counsel for Petitioners filed a blanket consent with the Clerk of the Court stating that they consent to the filing of any and all *amicus curiae* briefs in the present case. By letters dated February 13, 2009 and February 23, 2009, counsel for Respondents filed the same blanket consents with the Clerk of the Court. No counsel for any party in the present case has authored any part of this brief or contributed monetarily to its preparation or submission. No other person or entity, other than the *amicus curiae*, its members or its counsel, have made a monetary contribution to the preparation or submission of this brief.

the state of Connecticut has a strong public policy requiring strict compliance with civil service laws, and recognizing the importance of competitive examinations as part of the government's civil service system. By statute, Congress has made explicit its intent that federal courts adjudicating Title VII cases respect state law and interests. Therefore, although the present case was brought pursuant to federal law, the District Court and Second Circuit should not have ignored the state's crucial public policy. By doing so, these decisions pave the way for a dangerous departure from the merit-based civil service system for hiring and promoting firefighters and other civil servants in Connecticut.

Indeed, this dangerous precedent is no longer a hypothetical proposition. Several Bridgeport, Connecticut firefighters have sued the Bridgeport Civil Service Commission and its personnel director in federal court for re-weighting and re-scoring a promotional examination. The Bridgeport personnel director's explicit reliance on the Second Circuit decision in the present case to take this discriminatory action exemplifies the undesirable impact this decision already has had on a neighboring Connecticut city.

The decision in favor of Respondents is particularly disturbing because the District Court relied heavily on unsworn statements made in non-adversarial proceedings before the City of New Haven's Civil Service Commission. The Second Circuit inappropriately upheld the District Court ruling under these circumstances, especially where individual rights, the

public's safety, and Connecticut's civil service system are at stake.

ARGUMENT

I. THE DISTRICT COURT RULING AND THE SECOND CIRCUIT AFFIRMANCE DIRECTLY CONFLICT WITH STRONG PUBLIC POLICY OF THE STATE OF CONNECTICUT THAT REQUIRES STRICT COMPLIANCE WITH CIVIL SERVICE LAWS AND RECOGNIZES COMPETITIVE EXAMINATIONS AS THE CORNERSTONE OF A MERIT-BASED SYSTEM OF GOVERNMENT EMPLOYMENT.

The Charter of the City of New Haven (the "City Charter") sets forth a merit-based civil service system that mandates a strictly competitive process for the hiring and promotion of City firefighters. Specifically, "the 'Rule of Three' in the City Charter mandates that a civil service position be filled from among the three individuals with the highest scores on [the applicable competitive examination]." *Ricci v. DeStefano*, 554 F.Supp.2d 142, 145 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 894 (2009).

As set forth in detail in Petitioners' brief, during the process of developing and administering the promotional examinations for the positions of lieutenant and captain in the New Haven fire department, the City complied with all federal guidelines, adhered to the highest professional standards of

testing, and afforded all interested parties with the assistance and tools necessary to succeed on the examinations. Nevertheless, Respondents' decision not to certify the examinations was upheld simply because insufficient numbers of minority candidates obtained scores that would make them eligible for promotions. Thus, the effect of the District Court ruling and the Second Circuit affirmance of that ruling is to nullify civil service examinations in Connecticut and, thereby, eviscerate merit-based employment for government employees.

Although Title VII is a federal statute, Congress still intended for federal courts to respect state law and interests when adjudicating Title VII cases. *See* 42 U.S.C. § 2000e-7 (provision of Title VII regarding its effect on state laws). In fact, the Second Circuit has acknowledged that a state "mandate that appointments to civil service positions be based on merit and fitness, to be ascertained by competitive examination where 'practicable', may not be blinked at or avoided." *Chance v. Board of Examiners*, 561 F.2d 1079, 1090 (2d Cir. 1977) (citation and internal quotation marks omitted). As set forth below, the outcome in the present case conflicts directly with the strong public policy of Connecticut. By ignoring this public policy, the District Court and Second Circuit have improperly opened the door for the very abuses the civil service laws were designed to eradicate.

For many years, the Connecticut Supreme Court has stressed the importance of strict compliance with

civil service laws, not only to ensure that municipalities hire and promote the most qualified individuals, but to stem the inevitable corruption and other ills that occur whenever these rules are relaxed. In *Resnick v. Civil Service Commission*, 156 Conn. 28, 238 A.2d 391 (1968), the Court first articulated this policy comprehensively:

> The purpose of [the civil service] laws is to ensure the appointment of personnel possessed of the qualifications which are necessary for a fit and intelligent discharge of duties pertaining to public office and to free public employees from the fear of political and personal prejudicial reprisal.

Id. at 31 (citations omitted).

> Strict compliance with the terms of the civil service law is required where the legislative intention is manifest in the light of the purposes of such a statute. . . . Good faith of the parties will not validate an illegal appointment and will not be sanctioned by the courts. . . . It is mandatory that every requirement of the civil service law be followed, and proof that substantial compliance exists is not enough. The doctrine of substantial compliance has no application to the performance of duty by those entrusted with the administration of the civil service law. It would open the door to abuses which the law was designed to suppress.

Id. at 32-33 (citations and internal quotation marks omitted).

The trial court in *Resnick* had upheld the City of Bridgeport's decision not to certify the plaintiff to an eligible list for legal aides, after he completed a written and oral examination. Specifically, the trial court had found that although the city charter prohibited questions in any test relating to religious or political affiliations, because oral examiners asked such questions of the plaintiff in a friendly manner and did not use his answers as criteria for rating his fitness, the city had substantially complied with the charter requirements. *Id.* at 30. Invoking the above principles, the Supreme Court rejected the trial court's analysis, and declared the examination illegal and void. *Id.* at 33.

Since the Court decided *Resnick*, it has reaffirmed its stringent position several times. Most significantly, the Court has made clear that municipalities cannot circumvent civil service requirements by manipulating the examination process in any way. For example, in *Walker v. Jankura*, 162 Conn. 482, 294 A.2d 536 (1972), the Court held that the City of Bridgeport could not delay an examination for police inspector to permit two of the defendants to acquire the experience necessary to be eligible for the examination. *Id.* at 490-91.

Bridgeport's city charter provided that an examination for the position at issue in *Walker* had to be held within 120 days of the time the position became vacant, and civil service regulations required that candidates have three years experience as a police captain to be eligible to take the examination of police

inspector. The plaintiff and one other candidate had the required three years' experience at the end of the 120 day period; the other candidates who sat for the examination did not have the three years' experience until ten days before the examination was actually administered. *Id.* at 485-86. Because the city did not strictly comply with the civil service law, the Court upheld the trial court's finding that the examination was void and illegal. *Id.* at 490-91.

Likewise, in *Cassella v. Civil Service Commission*, 202 Conn. 28, 519 A.2d 67 (1987), the Court upheld the decision of the New Britain civil service commission to demote the plaintiff, a member of the New Britain fire department, from lieutenant to private, because his promotional examination had been "fixed" and, therefore, he had not been promoted according to the rules of the city charter and the civil service commission. *Id.* at 36-38. In reaching its decision the Court stated:

> It cannot be overemphasized that proper competitive examinations are the cornerstone upon which an effective civil service system is built. Any violation of the law enacted for preserving this system, therefore, is fatal because it weakens the system of competitive selection which is the basis of civil service legislation.

Id. at 35 (citations and internal quotation marks omitted).

Perhaps most significantly, the Court more recently held that manipulation of examination scores by New Haven's police department violates the "Rule of Three" in the City Charter and civil service rules – the same rule that applies in the present case. In *Kelly v. New Haven*, 275 Conn. 580, 881 A.2d 978 (2005), the Court specifically addressed whether the City's practice of rounding police examination scores to whole numbers and then placing scores in groups violated this section of the City Charter and civil service rules. *Id.* at 582-83.

In reaching its decision, the *Kelly* Court emphasized "the importance of maintaining the integrity of [the City's] civil service system." *Id.* at 608 (citation and internal quotation marks omitted). The Court also noted that "the charter vests broad authority in the personnel director to prepare, conduct and score examinations. . . . This authority, however, does not include the authorization to act in a way that is unreasonable, arbitrary or illegal." *Id.* at 609-10. Construing the purpose behind the City Charter, the Court then found that the City's discretion did *not* allow it to manipulate the examination process by rounding scores to increase the number of individuals eligible for promotion:

> The civil service board was designed to eliminate *as far as practicable* the element of partisanship and personal favoritism in making appointments. . . . Promotion on the basis of merit, not nepotism, has been the guiding rule. . . . Thus, the defendants' discretion in

> making such promotional decisions must be limited. . . . [N]o one would dispute that this discretionary power is not validly exercised in the name of merit selection if, in awarding a position, the department head is predisposed to excluding certain candidates from the position based upon factors unrelated to performance capability and compatibility.
>
> [T]he rounding of scores, when applied to a process under which candidates with tie scores are treated as one score group warranting equal consideration under the rule of three, violates the spirit and the letter of the civil service provisions of the charter.

Id. at 614-16 (citations and internal quotation marks omitted; emphasis in original). *See also Broadnax v. New Haven*, 270 Conn. 133, 160, 851 A.2d 1113 (2004) (Court held that "underfilling" in New Haven's fire department was prohibited because it violated the City Charter, ordinances and civil service rules); *New Haven Firebird Society v. The Board of Fire Commissioners of the City of New Haven*, 32 Conn. App. 585, 591-93, 630 A.2d 131, *certif. denied*, 228 Conn. 902, 634 A.2d 295 (1993) (Court held that "stockpiling" in New Haven's fire department was illegal because it violated New Haven's civil service law).

In the present case, the District Court and Second Circuit sanctioned a practice that allows a municipality to manipulate the competitive examination process by ignoring its results completely. As set forth in *Kelly*, this outcome gives Respondents unreasonable

discretion in making promotions in the City's fire department – discretion that clearly violates the Rule of Three in the City Charter. Although merit considerations are important for any government position, they are even more essential in positions where public safety is implicated, as well as the safety of firefighters. In these situations, commanding officers must make life and death decisions. Consequently, the Second Circuit has set a dangerous precedent for the City of New Haven by affirming the District Court ruling.

Furthermore, the Second Circuit affirmance has an even more widespread impact, because it sends the wrong message to municipalities throughout the state of Connecticut. The message is that municipalities need not strictly comply with civil service laws anymore, and competitive examinations are no longer the cornerstone of the civil service system. This will open the door to the very abuses the civil service laws were designed to eradicate.

The citizens in Connecticut's cities are especially diverse, consisting of a multitude of racial, ethnic, national and religious groups. The civil service laws are designed not only to ensure promotion of the individual best fit for a particular position, but to deter elected officials from handing out favors to constituents as "payment" for votes. Now, in the guise of helping minorities to succeed, municipalities will be free to discount or even ignore merit and fitness as criteria for hiring and promotion, and they will also be free to return to a system where partisanship and

personal favoritism rule the day. Such a system violates the clear public policy of Connecticut and cannot be countenanced.

II. THE SECOND CIRCUIT DECISION HAD AN IMMEDIATE DISCRIMINATORY IMPACT ON THE PROMOTION OF FIREFIGHTERS IN THE CITY OF BRIDGEPORT'S FIRE DEPARTMENT.

The dangerous precedent set by the Second Circuit decision is no longer a hypothetical proposition – it is very real. In the summer of 2008, a number of Bridgeport, Connecticut firefighters sued the Bridgeport Civil Service Commission and its personnel director, challenging the personnel director's decision to re-weight and re-score the examination given to determine who should be promoted to the position of lieutenant in the Bridgeport fire department. Most significantly, the Bridgeport personnel director relied heavily on the Second Circuit decision in the present case to reach the conclusion that he had no alternative but to tamper with the test results. *See Timothy Bottone, et al. v. City of Bridgeport, et al.*, Civil Action No. 3:08 CV 01320 (JCH) (D. Conn.)[2]

[2] BFME respectfully requests that this Court take judicial notice of the court file in the *Bottone* case. *See Wells v. United States*, 318 U.S. 257, 260 (1943) (federal courts may take judicial notice of proceedings in district court cases).

In *Bottone*, the original scoring methodology, which test takers had notice of prior to sitting for the examination, weighted the examination 50% for the written component, 45% for the oral component, and 5% for seniority. After the examination was administered and scored, the personnel director claimed that the results of the examination had a disparate impact on minority candidates which required immediate action to correct. The personnel director then changed the scoring methodology to 25% for the written component and 75% for the oral component.

This re-weighting and re-scoring ultimately provided a revised promotional list that elevated the scores of minority candidates and adversely affected the plaintiffs' opportunities for promotion. As set forth above, the Bridgeport personnel director took this action – an action arguably even more egregious than that taken by Respondents – claiming that he was required to do so by federal law, specifically, "adhering to the holding in *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008)." *See Timothy Bottone, et al. v. City of Bridgeport, et al.*, Civil Action No. 3:08 CV 01320 (JCH) (D. Conn.), Defendant City of Bridgeport's Objection to Plaintiffs' Motion to Disqualify Counsel, dated October 7, 2008, at 3.

The negative repercussions of the Second Circuit decision have already extended beyond New Haven, to a neighboring Connecticut city. These negative repercussions must not spread any further and continue to marginalize Connecticut's important merit-based civil service system. The present case

gives this Court the unique opportunity to act decisively, thereby ensuring that those chosen to fill civil service positions in all of Connecticut's municipalities are selected based solely on merit, as mandated by Connecticut law.

III. THE DISTRICT COURT IMPROPERLY RELIED ON UNSWORN STATEMENTS MADE IN NON-ADVERSARIAL PROCEEDINGS TO DETERMINE THAT RESPONDENTS HAD A GOOD FAITH DEFENSE UNDER TITLE VII.

Respondents primarily argued before the District Court that their decision not to certify the examinations was justified because it was based on a good faith belief that to do so would violate Title VII. *Ricci v. DeStefano*, 554 F.Supp.2d at 148 n. 4. The District Court wholeheartedly agreed, as succinctly expressed by the Second Circuit in its summary order adopting the District Court opinion and affirming its judgment: "Because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected." *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008).

The determination that Respondents acted in good faith was based largely on statements made in five meetings before the New Haven Civil Service Board (the "CSB") between January and March 2004. Indeed, the District Court cited in detail and relied on

what it referred to as testimony provided at these "hearings" by a number of individuals, including "expert witnesses." *Ricci v. DeStefano*, 554 F.Supp.2d at 145-150. Nevertheless, the proceedings before the CSB were *not* formal adversarial hearings where witnesses testified under oath, where any rules of evidence were observed, or where cross-examination of witnesses was permitted. As a result, the conclusions of both the District Court and the Second Circuit finding that Respondents had a good faith defense sufficient to deny Petitioners a trial on their discrimination claims was based on nothing more than unsworn, hearsay statements.

For example, the District Court apparently valued unsworn and inherently unreliable statements made by minority representatives, to justify Respondents' actions here. The District Court cited statements made by Donald Day, a representative of the Northeast Region of the International Association of Black Professional Firefighters, who argued against certification, claiming "there was something inherently wrong with this test because minorities did not score as highly [as they did on previous tests]," and urging the CSB to speak with the director of the Civil Service Commission in Bridgeport, Connecticut, "to find out what Bridgeport is doing different [sic] than New Haven as they have more diversity in their firefighter ranks." *Ricci v. DeStefano*, 554 F.Supp.2d at 146 (citation and internal quotation marks omitted). The District Court also cited statements of Ronald Mackey, the Internal Affairs Officer for the

same organization, who proposed that New Haven "adjust the test as Bridgeport had done, in order to meet the criteria of having a certain amount of minorities get elevated to the rank of Lieutenant and Captain." *Id.* at 147 (citation and internal quotation marks omitted).

Neither Mr. Day nor Mr. Mackey was identified as an expert with specialized knowledge in the testing field, and in fact, they provided no reasonable bases for the conclusions that there was something "inherently wrong" with the test or that it should be "adjusted." Their positions in a black firefighter association indicate that these individuals clearly had one agenda – to advance what they believed to be in the best interests of black firefighters. Because their statements were not made under oath and they were not subject to the scrutiny of cross-examination, there was no formal mechanism to challenge the accuracy of their statements, their competency as "witnesses," or to expose any biases these men may have harbored.[3]

[3] It is ironic that Mr. Day and Mr. Mackey argued so forcefully in 2004 that New Haven should follow Bridgeport's example, strongly implying that Bridgeport was doing things the right way to promote diversity, but in 2008, the personnel director for Bridgeport's Civil Service Commission determined that the Second Circuit's holding in the present case required him to re-weight and re-score a lieutenant's examination to elevate the positions of minority candidates.

To allow any party to prevail under these circumstances is highly problematic. However, the import of the Second Circuit decision is of even greater concern when one considers what is at stake in the present case – individuals' rights to equal protection under the law, the public's safety, and the vitality of Connecticut's entire merit-based civil service system.

CONCLUSION

For all of the reasons set forth herein, the judgment of the Second Circuit should be reversed.

Respectfully submitted,

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